

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 11

AVANTE AT WILSON, INC.¹

Employer

and

Cases 11-RC-6495
11-RC-6496

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 204, a/w UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION, CLC²

Petitioner

DECISION AND DIRECTION OF ELECTION

The Employer, Avante at Wilson, Inc., is a North Carolina corporation with its principal office and place of business in Wilson, North Carolina, where it is engaged in providing residential nursing, housekeeping and dietary services to its clients. The Employer and Petitioner, United Food and Commercial Workers Union, Local 204, a/w United Food and Commercial Workers International Union, AFL-CIO, CLC, are now parties to a collective bargaining agreement for a unit comprised of all full-time and regular part-time nursing assistants (hereinafter CNAs), orderlies, cooks, dietary employees, maintenance employees, ward clerks, central supply clerks, housekeeping, laundry employees, restorative nurses aides, rehabilitation aides and activities assistants at the Employer's Wilson, North Carolina facility. The collective bargaining agreement is effective November 1, 2007, through October 31, 2010.

¹ The name of the Employer appears as amended at hearing.

² The name of the Petitioner appears as amended at hearing.

The Petitioner has filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act in Case No. 11-RC-6495 seeking to represent a unit of all full-time and part-time licensed practical nurses (LPNs) at the Employer's Wilson, North Carolina facility. Petitioner has also filed a petition in Case No. 11-RC-6496 seeking to represent a unit of all full-time and part-time registered nurses (RNs) employed at the same facility.³

On November 22, 2002, the Regional Director issued a Decision and Order finding that the LPNs and RNs were supervisors within the meaning of Section 2(11) of the Act and I, accordingly, dismissed the petitions.⁴ Thereafter, the Petitioner filed a timely request for review with the National Labor Relations Board (hereinafter Board) in which Petitioner asserted that the LPNs and RNs were statutory employees. On October 31, 2006, the Board issued a decision finding that the Employer failed to establish that the LPNs and RNs had Section 2(11) authority with regard to disciplining CNAs and adjusting their grievances and, accordingly, the Board reinstated the instant petitions and remanded the cases to the Region for further action. Avante at Wilson, Inc. 348 NLRB No. 71 (2006).

On February 15, 2008, the Acting Regional Director issued an Order to Show Cause on whether the record should be reopened for the purpose of receiving evidence of any changed circumstances bearing on the authority of the LPNs and RNs to assign, responsibly direct and exercise independent judgment within the meaning of Section 2(11). On March 3, 2008, the Employer responded to the Order to Show Cause asserting that (1) circumstances have changed since the original petitions were filed, and (2) it has specific evidence to support its argument of

³ At hearing the parties stipulated that the rehabilitation department and staffing coordinator should be excluded from both bargaining units. I further note that the Union sought and the Employer declined to recognize the bargaining units at issue.

⁴ The parties stipulated that this record supplements the testimony and exhibits in the prior hearing.

supervisory status. Thereafter, a hearing officer of the Board held a hearing and the parties filed briefs with the Regional Director.

As evidenced at the hearing and in the briefs, there are two issues: (1) whether the LPNs and RNs, referred to jointly as “charge nurses,” are supervisors as defined in Section 2(11) of the Act; and (2) whether the wound care nurse is a supervisor as defined in Section 2(11) of the Act. The Employer contends that both the charge nurses and wound care nurse are supervisors as defined in Section 2(11) and, therefore, the petitions should be dismissed. The Petitioner maintains that the charge nurses and wound care nurse are statutory employees and, thus, the units it seeks to represent are appropriate.

I have considered the evidence and the arguments presented by the parties on the issues. As discussed below, I have concluded that the charge nurses are not supervisors as defined in Section 2(11) of the Act. Accordingly, I shall direct an election in the petitioned-for units. In addition, I conclude that the wound care nurse is a supervisor under the Act, and, therefore should be excluded from the bargaining units. To provide a context for my discussion of the issues, I will first present an overview of the Employer’s operations including, a brief discussion of the nursing and wound care units. I will then provide my analysis, including a detailed discussion of the relevant legal authority and its application to the facts presented herein.

I. Employer’s Operation

The Employer operates a nursing care facility that provides patient care to approximately 110 residents. Residents are typically paired in a room housed on two wings denoted “A” and “B” and on a hallway connecting the two wings, which is referred to as the cross-hall. The “A” and “B” wings are further subdivided into “A front and back,” and “B front and back.”

In conducting its operations, the Employer employs approximately 140 employees. In charge of the entire operation is an Administrator to whom a number of department directors report, including the Director of Nursing (DON). Immediately reporting to the DON is the Assistant Director of Nursing (ADON) who is responsible for the oversight of several units, including the RN unit and wound care. As these are the two units at issue here, I will now provide a brief description of their separate operations.

A. RN Unit

The RN unit is responsible for the day-to-day care of the residents. The unit is directed by two unit managers, an LPN supervisor and a weekend RN supervisor, all of whom the parties stipulate are supervisors under the Act. The charge nurses report to these supervisors and are mainly responsible for attending to patients on their assigned halls, administering medication, acting as the first line of defense when addressing family members' concerns and working with the CNAs to make sure that patients' needs are met. There are approximately 18 charge nurses, including 16 LPNs and 2 RNs.

There are approximately 44 CNAs all of whom are subordinate to the charge nurses. The CNAs' duties include more ministerial tasks, many of which are recorded on the Activities of Daily Living (ADL) chart, such as bathing, shaving, changing, feeding and assisting residents with basic living needs.

During the week, the charge nurses along with the CNAs operate on a 3-shift schedule: 7:00 a.m. – 3:00 p.m. (first); 3:00 p.m. -11:00 p.m. (second); and 11:00 p.m. – 7:00 a.m. (third). For both first and second shift, each wing has two charge nurses and approximately four CNAs. Although there is a CNA assigned to the cross-hall during these shifts, there is no designated cross-hall charge nurse. During the day shifts, the DON, ADON and unit managers are present

at the facility until 6:00 p.m. and the LPN supervisor remains until 11:00 p.m.; thus, at all these times, an admitted supervisor is physically present at the facility.

On third shift there are three charge nurses on duty; one charge nurse assigned to each wing and one assigned to the cross-hall. Each third shift charge nurse works with approximately 2 CNAs. During third shift there are no admitted supervisors present; however, the DON remains on-call 24-hours.

On weekends, although CNAs continue to work a 3-shift schedule, charge nurses work 12-hour shifts, either 7:00 a.m. to 7:00 p.m. or 7:00 p.m. to 7:00 a.m.. Two charge nurses are assigned to each wing and one to the cross-hall on the morning weekend shift, and only one charge nurse is assigned to each wing and the cross-hall during the evening shift. At any given time on the weekends there are approximately 6-9 CNAs. The only stipulated supervisor present on the weekend is the weekend supervisor, who works day shift. After 7:00 p.m. there are no stipulated supervisors present, however the DON is on-call.

B. Wound Care Unit

The wound care nurse, who can be an LPN or RN, reports directly to the ADON and has specialized training in wound care. The wound care nurse's main responsibility is to attend to the restorative needs of residents, which includes tending to patient's wounds, completing documentation and assisting charge nurses when needed. Subordinate to the wound care nurse are 5 restorative CNAs who are responsible for splinting, performing range-of-motion exercises with patients and providing patient assistance when necessary. The restorative CNAs do not have specialized training, but instead, simply have basic CNA knowledge which is then supplemented with training from the rehabilitation department.

The wound care nurse works 8:00 a.m. to 5:00 p.m., Monday through Friday. The restorative CNAs work 7:00 a.m. – 3:00 p.m. with varying days and weekends off. Although the wound care nurse does not work weekends, she is available by telephone.

II. Analysis

As stated above, the Employer contends that the charge nurses and wound care nurse are supervisors as defined by Section 2(11) of the Act and, therefore, the petitions should be dismissed. To the contrary, the Petitioner asserts that the charge nurses and wound care nurse are statutory employees.

Section 2(11) of the Act defines the term supervisor as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” The provision is to be read in the disjunctive and any of the enumerated criteria is sufficient to confer supervisory status. Kentucky River Community Care, Inc., 532 U.S. 706, 713 (2001). The exercise of one of the specified criteria or the authority to effectively recommend such action must involve the use of independent judgment. Harborside Healthcare, Inc., 330 NLRB 1334 (2000). To exercise independent judgment, “...an individual must at minimum act, or effectively recommend action, free of control of others and form an opinion or evaluation by discerning and comparing data.” Oakwood Healthcare, Inc., 348 NLRB No. 37, slip op. at 8 (2006). Judgment is not independent if it is dictated by detailed instructions, whether they be written in company policy, verbal instructions from a higher authority or

provisions in a collective bargaining agreement. Id. In short, the degree of discretion must rise above that which is routine or clerical in nature. Id.

The burden of proving supervisory status lies with the party asserting that such status exists. Kentucky River 532 U.S. at 710-712. The lack of evidence is construed against the party asserting supervisory status. Dean & Deluca New York, Inc. 338 NLRB 1046, 1047 (2003). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. Id. at 1047. Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. Sears Roebuck & Co., 304 NLRB 193, 193 (1991).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory authority even if this authority has not yet been exercised. See e.g., Pepsi-Cola Co., 327 NLRB 1062, 1063 (1999); Fred Meyer Alaska, Inc., 334 NLRB 646 (2001). However, the absence of evidence that such authority has been exercised may be probative of whether such authority exists. See Michigan Masonic Home, 332 NLRB 1409 (2000); Chevron U.S.A., 308 NLRB 59, 61 (1992).

A. The Employer failed to present sufficient evidence to establish that the charge nurses are supervisors under the Act.

With regard to whether the charge nurses possess any of the 12 criteria listed in Section 2(11), the parties stipulated that the charge nurses do not have the authority to hire, discharge, lay off, recall or promote employees. The Employer asserts, however, that the charge nurses have the authority to assign, responsibly direct, discipline, and adjust CNA grievances. In addition, the Employer asserts that the charge nurses evaluate CNAs, thereby affecting their terms and conditions of employment. Based on the evidence presented at hearing, I find the

Employer failed to meet its burden in establishing that the charge nurses are supervisors under the Act. Accordingly, I will direct an election in the petitioned-for units.⁵

At the outset, the Employer argues that the charge nurses are supervisors simply because their written job descriptions prescribe Section 2(11) authority. I am not persuaded by this argument, as the Board has long held that job descriptions or other documents suggesting supervisory indicia are not controlling in the absence of concrete evidence that the authority actually exists. Golden Crest Healthcare Center, 348 NLRB No. 39, slip op. at 5 (citing Training School at Vineland, 332 NLRB 1412, 1416 (2000) (“Job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. The Board insists on evidence supporting a finding of actual as opposed to mere paper authority.”)); Heritage Hall, EPI Corp., 333 NLRB 458, 458-459 (2001) (employees are not transformed into supervisors merely by virtue of their job titles or job descriptions).

In the prior proceeding, the Board found the Employer’s job descriptions suspicious as they inaccurately reflected that RNs supervised LPNs, even though the Employer stipulated that the duties associated with the two positions were identical. Avante at Wilson, Inc., 348 NLRB No. 71, slip op. at 4 (2006). During this hearing, there was no evidence that the RN job description has since been modified. In fact, the evidence establishes that the RN job description remains the same regarding their duty to “supervise the day-to-day nursing activities performed by Licensed Practical Nurses.” Nevertheless, the Employer continues to assert that the RN and LPN duties are identical. As the parties stipulated that the record here supplements the prior hearing and the evidence demonstrates that the RNs’ job description provides that they supervise

⁵ The Employer cites several secondary indicia of supervisory status such as the charge nurses’ attendance at monthly in-service meetings, the absence of 2(11) supervisors during certain periods of time, and the fact that both charge nurses and CNAs consider charge nurses to be supervisors. As the Employer has failed to establish any of the primary indicia of supervisory status, I do not find the secondary indicia to be determinative.

LPNs, I find that the job descriptions are still inaccurate and, therefore, unreliable. Thus, the burden falls on the Employer to present concrete evidence that the charge nurses actually assign, responsibly direct, discipline, adjust grievances and evaluate CNAs.

(1) Assignment

The Employer contends that the charge nurses have the authority to assign work within the meaning of Section 2(11) of the Act. In Oakwood Healthcare, Inc., the Board defined assignment of work as “the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks.” Oakwood Healthcare 348 NLRB 37 slip op. at 4. The Board stated that “...choosing the order in which the employee will perform discrete tasks within those assignments (e.g. restocking toasters before coffeemakers) would not be indicative of exercising the authority to ‘assign.’” Id. at 5. Assign in the 2(11) sense refers to the designation of “significant overall duties to an employee” not mere “ad hoc instruction that the employee perform a discrete task.” Id. Using the nursing profession as an example, the Board noted that if a charge nurse designates an LPN to be the individual responsible for regularly administering medicine to a patient, that is an assignment indicative of supervisory status. Id. On the other hand, if a charge nurse orders an LPN to immediately administer medicine to a patient, that is not an assignment within the meaning of Section 2(11). Id.

Once the Employer establishes that the charge nurses have the authority to assign, it then must show that when making such assignments, the charge nurses exercise independent judgment. As such, I will now analyze the evidence presented regarding the charge nurses’ actual authority to assign to a location, assign to a particular time and assign significant duties,

and, if the evidence demonstrates they have such authority, I will then address whether they exercise independent judgment.

a. Assignment to a Location

Here, while the record demonstrates that charge nurses have the authority to assign CNAs to a location, I find that such assignments do not require the use of independent judgment. In this regard, the evidence establishes that CNAs do not have permanent wing or hall assignments; instead, they are on a scheduled rotation. Upon reporting to work, CNAs are informed about their assigned location through preprinted assignment sheets completed by the staffing coordinator, second-shift supervisor or third-shift charge nurse. There is an assignment sheet for each staffing level, ranging from as few as four CNAs to as many as twelve, which divides the patients' rooms among the CNAs. The assignment sheet not only provides the CNA's location for that day, but also dictates breaks, lunches, dining room coverage, and deadlines for completing patient-related paperwork.

Although first and second-shift charge nurses do not initially complete the assignment sheets, there is evidence that they modify assignments when there are changes to the staffing levels.⁶ For example, if a CNA leaves early, comes in to provide additional assistance or calls out sick, the charge nurse will change the written assignment sheet to reflect the increase or decrease in staff. As the charge nurses have the authority to change the assignment sheet to reflect the proper staffing level, thereby reassigning a CNA to a different wing or location, I find that they have the authority to assign a CNA to a particular location. See I.H.S. Acquisition No. 114, Inc. 350 NLRB No. 44 slip op. at 2 (2007)(LPNs and RNs found to have authority to assign

⁶ The record is silent on how often charge nurses must reassign CNAs, thereby modifying the preprinted assignment sheets.

where they could add routine assignments to a preprinted assignment sheet or reassign CNAs as necessary).

As discussed above, once the authority to assign is established, the Employer bears the burden to prove that such authority is exercised using independent judgment. Here, the Employer's witnesses testified when assigning CNAs, charge nurses consider factors such as the number of empty rooms, patient preferences, and the CNAs' ability to work together.

To the contrary, a charge nurse testified that when reassigning CNAs she simply talks with them to see who has completed their assigned work, in order to balance the workload, or she seeks a recommendation from the staffing coordinator or unit manager. She further testified that the only factor that would keep her from assigning a CNA to a particular patient would be the objection of the patient or the patient's family members. When asked if she considers the skills and abilities of the CNA, the charge nurse testified that she assumes that all CNAs are capable of caring for patients equally and have similar skills and abilities.

Similarly, another charge nurse testified that when changing the assignment sheets she considers family requests as well as the acuity of the patient. For example, she testified that she would not assign a CNA three patients that require extra care; instead, she would balance the patient load among the CNAs.

The charge nurses' testimony fails to demonstrate that they use independent judgment when making assignments; to the contrary, it establishes that assignments are routine and do not involve a high degree of discretion. In this regard, there is no evidence that charge nurses consider the individual skills and abilities of the CNAs or any other subjective factors. Catering to the requests of patients and their family members does not evidence independent judgment, but instead merely reflects a desire to satisfy client preferences. Furthermore, mere equalization

of the workload, that is, deciding not to give a CNA three difficult patients, is commonsense and does not suggest independent judgment.

b. Assignment to a Particular Time

I further find that the charge nurses do not have the authority to assign CNAs to a particular time. In this regard, the staffing coordinator creates the monthly schedule which sets forth the CNAs' designated shifts.⁷ Should a CNA wish to change shifts, he or she must submit the request to the staffing coordinator. There is no testimony that charge nurses can transfer a CNA from one shift to another.

Similarly, the staffing coordinator is the individual responsible for coordinating employee absences. In this regard, a notice is posted in the employee breakroom instructing employees to call the staffing coordinator if they are going to be absent from their shift. In addition, on the monthly schedule, the staffing coordinator designates an individual on each shift who is required to stay four hours past their scheduled departure time to cover when the facility is understaffed. If the designated CNA refuses to stay, the DON will issue written discipline.

In the event that a CNA cannot reach the staffing coordinator, they can speak with a charge nurse regarding their absence. The charge nurse does not approve or disapprove the absence; instead, she simply determines whether additional coverage is needed based on the patient census, that being, the number of residents in the facility. State guidelines mandate a certain ratio of CNAs to patients. Although there was testimony that charge nurses can call in CNAs even if the Employer is above the state requirements, there was no evidence concerning the factors considered when determining whether to call in additional staff.

The Employer asserts that charge nurses have the authority to assign overtime because they can, as discussed above, request that a CNA come in or remain late causing the CNA to

⁷ The staffing coordinator is a non-bargaining unit position and has no supervisory authority over the charge nurses.

incur overtime. Although there is evidence that a charge nurse's request may lead to a CNA earning overtime, it is often the case that the charge nurse will have no idea how many hours that CNA has worked to even determine whether overtime will be incurred. Nevertheless, the record demonstrates that these overtime assignments are merely requests rather than mandatory requirements that a CNA report to work. The Board has recently held that the ability to "request" a certain action, rather than to "require," does not constitute evidence of supervisory authority. Golden Crest Healthcare Center, slip op. at 3 (2006).

Finally, I note that there is no testimony that charge nurses have the authority to grant time off. In this regard, vacation requests are submitted to and approved by the staffing coordinator. Likewise, in an emergency situation requiring a CNA to leave early, a charge nurse has no authority to keep the CNA from leaving.

c. Assignment of Significant Duties

The record fails to establish that the charge nurses have the authority to assign significant duties. In this regard, as the DON testified, the CNA job description sets forth their job duties which include performing rounds every two hours, passing ice, bathing, feeding, grooming, assisting, and providing nourishments to patients. In addition, a CNA's overall duties are governed by the ADL chart, assignment sheet and a form called a kardex, all of which dictate certain events and activities that are to take place throughout the shift. For example, the ADL chart requires that the CNA record the daily activities of the patient, including grooming, bathing and other daily living requirements. The kardex is a form maintained for each patient, stored at the nurses' station, which provides details concerning the resident's specific needs and the corresponding doctor's orders. CNAs will often refer to the kardex if they have questions about a patient specific need. As discussed earlier, the assignment sheet tells the CNA when to

perform certain tasks such as passing ice, assisting with the dining room or recording the output of patients.

There is insufficient evidence to establish that charge nurses can change the CNAs' overall shift duties as provided for in their job description, the ADL sheet, kardex or the assignment sheet; instead, the record reveals that charge nurses simply dictate the order in which overall tasks are completed. In this regard, the Administrator testified that the charge nurse prioritizes the order in which CNAs perform their duties. The record further demonstrates that the charge nurse can ask a CNA for assistance on a discrete task such as dressing, bathing or grooming a patient, thereby pulling the CNA from his or her regularly-scheduled duties to perform a more immediate task. The Board has specifically held that such ad hoc instruction to perform a discrete task or dictation concerning the order in which tasks are performed, is not indicative of supervisory authority. Oakwood 348 NLRB 37, slip op. at 5. I, therefore, find that the charge nurses do not have the authority to assign significant duties.

(2) Responsibly Direct

As provided in Oakwood, the term “responsibly direct” is “not limited to department heads.” Oakwood, 348 NLRB 37 slip op. at 6. Rather, “[i]f a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it, that person is a supervisor provided that the direction is both ‘responsible’...and carried out with independent judgment.” Id. The Board held that for direction to be “responsible,” the person directing the task must be accountable for its performance. Id., slip op. at 6-7. The Board further held that to establish accountability, “it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if

necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he or she does not take these steps.” Id., slip op. at 7.

Here, I find that the Employer established that its charge nurses have the authority to direct CNAs in their daily duties, as the charge nurses routinely monitor their performance in completing such tasks as bathing, grooming, feeding and transporting patients. Although the methods by which the CNAs perform their specific duties are contained in detailed policies, procedures and protocols maintained by the Employer, the charge nurse who observes a CNA not properly performing a given procedure may immediately instruct the CNA regarding the proper procedure or method to use.

The record also demonstrates that charge nurses have the authority to direct CNAs to perform certain tasks when necessary. For instance, a charge nurse can ask a CNA to assist with an injured patient, thereby taking the CNA from his or her regular duties. Similarly, a charge nurse may direct a CNA to make sure patients finish their meal, ask a CNA for assistance in cleaning up a tracheotomy, or answer a call light when call lights are activated simultaneously.

While the record demonstrates that charge nurses have the authority to direct CNAs, there is, however, insufficient evidence to establish that charge nurses engage in responsible direction. In this regard, the Employer provided conclusory testimony that charge nurses are the “guards” of their halls, including the performance of the assigned CNAs. To buttress this assertion, the Employer presented approximately seven written warnings showing charge nurses being disciplined for conduct on their assigned hall; but, six out of the seven written warnings involved the charge nurse being disciplined for his or her own neglectful conduct, not the actions of the CNA. Although the last written warning indicates that the charge nurse was disciplined for failing to appropriately “supervise” a CNA on her hallway, this written warning is dated July

2003 and is, therefore, too remote in time to establish that charge nurses are accountable today. Moreover, this one instance in which a charge nurse was held accountable for the actions of an assigned CNA appears to be an aberration from the standard practice. As none of the charge nurses at hearing testified to being disciplined based on the failures or misconduct of an assigned CNA, I find that there is insufficient evidence to demonstrate that the charge nurses are held accountable for the actions of CNAs through the disciplinary procedure.

The Employer also argues that the charge nurses are held accountable for the conduct of CNAs under the evaluation process. In this regard, the record demonstrates that charge nurses are evaluated on an annual basis. The charge nurses' overall evaluation rating determines their merit increase. The Employer presented evaluations for three charge nurses. The evaluation form indicates that charge nurses are critiqued on their ability to: (1) persuade and inspire CNAs to accomplish their tasks, (2) delegate appropriate responsibility and authority to subordinates, (3) create a positive work environment and reward superior performance, and (4) demonstrate creative and innovative problem solving and decision-making.

I conclude that the evaluation forms fail to establish that charge nurses are held accountable for the actions of the subordinate CNAs. In this regard, a review of the form indicates that charge nurse are rated on their own ability to lead and motivate, as opposed to being held directly accountable for the performance and abilities of their subordinates. I further note that the Employer failed to explain or proffer specific examples of conduct that would result in a charge nurse receiving a less than satisfactory evaluation on this particular performance expectation. For example, one of the evaluations indicated that the charge nurse did not meet expectations in terms of her ability to lead and motivate; yet, the Employer failed to spell out the conduct that negatively impacted the charge nurse's evaluation. I, therefore, conclude there is

insufficient evidence to establish that charge nurses are accountable for the performance of the CNAs.

(3) Discipline

The Employer argues that charge nurses have the authority to discipline because they can: (1) give “teachable moments;” (2) issue written warnings; and (3) send a CNA home. I find that the record fails to establish that charge nurses have the authority to discipline; accordingly, I will address each argument below.

a. Teachable Moments

It is undisputed that charge nurses have the authority to provide teachable moments to CNAs. A teachable moment is a form which records the date, time and subject matter of a meeting held between a “presenter” and “attendees.” The form allows the presenter to list the method of presentation, which may include a lecture, demonstration or film. Blank forms are kept at the two nurses’ stations. Upon completion, teachable moments are filed in a book maintained in the ADON’s office and, on occasion, they are filed in an employee’s personnel file. The record is silent on who makes the decision to place a teachable moment in an employee’s personnel file; however, it is undisputed that charge nurses do not have access to CNA personnel files.

The Employer asserts that a teachable moment is a precursor for disciplinary action and, because charge nurses can give teachable moments, they have the authority to discipline CNAs. In this regard, Employer witnesses testified that teachable moments are used to notify employees that they are not following company policy or meeting their job requirements. If an employee receives a teachable moment, he or she may be subject to greater scrutiny should the subject matter discussed become an issue in the future. Although the record is devoid of specifics, the

Employer's witnesses testified that when a CNA continuously fails to comply with a teachable moment, the charge nurse informs the DON, they discuss the matter, the DON reviews the CNAs personnel file and then either the DON or charge nurse can issue formal written discipline.

Contrary to the Employer's assertions, I find that the charge nurses' use of teachable moments to report misconduct does not evidence authority to discipline. The Board has held that the ability to report incidents of employee misconduct, absent a recommendation regarding discipline, is not tantamount to supervisory authority, especially when the reports do not automatically result in discipline. Franklin Hospital Medical Center, 337 NLRB 826, 830 (2002) (charge nurses who filed reports of misconduct that did not result in discipline and were not accompanied by disciplinary recommendations did not have authority to discipline or effectively recommend discipline); Ten Broeck Commons, 320 NLRB 806, 812 (1996)(the authority to give employees oral warnings or written warnings on forms retained in the employee's personnel file is typical in cases involving nursing home charge nurses and without evidence of future personnel action or evidence that management failed to conduct an independent investigation, such write ups do not equate to supervisory authority).

Here, the charge nurses merely use teachable moments, at times, to document employee misconduct. None of the teachable moments presented at hearing provided formal recommendations for current or future discipline. Further, although the Employer's witnesses testified that after two teachable moments an employee receives discipline under the progressive disciplinary procedure, the record is devoid of any concrete evidence that prior teachable moments have been relied on to issue formal discipline.

Moreover, I find that teachable moments are simply that – moments used to teach or remind employees about proper procedure or policy. In this regard, the evidence demonstrates

that although teachable moments have been used to remind CNAs about company procedure on matters such as proper break times and answering patient alarms, they have similarly been used to provide initial instruction on properly turning or positioning patients and introducing new procedures. For example, a charge nurse testified that that in 2007 the therapy department gave a teachable moment on how to transfer a patient using the “drawsheet” method. She, along with other CNAs and charge nurses, was required to sign a teachable moment reflecting her attendance at the presentation. There is no evidence that this teachable moment was the result of an employee infraction, nor is there evidence that the therapy department has disciplinary authority over charge nurses.

Similarly, another charge nurse testified that within the month preceding the hearing, she was asked to sign a teachable moment on providing incontinent care to patients. The presentation was conducted by the rehabilitation department. Again, there is no evidence that this teachable moment was the result of an employee infraction, nor is there any evidence to suggest that the rehabilitation department has disciplinary authority over charge nurses.

At hearing, a teachable moment was presented that had been signed by a charge nurse and given to another charge nurse and several CNAs. Although there was speculative testimony that the charge nurse accidentally signed the teachable moment as “attendee,” as opposed to “co-presenter,” there was no direct evidence that the signature was inadvertent. As neither party asserts that charge nurses have disciplinary authority over other charge nurses, the fact that a teachable moment was issued by one charge nurse to another further demonstrates the non-disciplinary nature of a teachable moment.

Not only does the record demonstrate that employees have been asked to sign teachable moments even when they have not committed an infraction, it also demonstrates that employees

have been required to sign teachable moments even when they did not attend the actual presentation. For example, one charge nurse testified that a teachable moment was passed down from the 2nd shift supervisor for employees on her shift to sign even though they did not attend the lecture or presentation. In addition, a CNA testified that there have been occasions in which teachable moments have been “lined up” on the counter at the nurses’ station for staff to read and sign as they report to work.

The non-disciplinary nature of teachable moments is further evidenced by the fact that the Employer’s progressive discipline procedure fails to cite a teachable moment as a step in its progression. In this regard, the record demonstrates that the “Employee Counseling Record” (counseling record) outlines the progressive discipline procedure employed at the facility. The counseling record states that depending on whether the individual commits a minor, major or critical offense, discipline for a first offense can range from a documented oral reprimand to immediate termination. The counseling record does not indicate that teachable moments are given any consideration when determining the nature of the offense or the discipline to issue and, unlike formal discipline under the progressive discipline procedure, there is no direct evidence that teachable moments are grievable under the collective-bargaining agreement.

The Employer cites Berthold Nursing Care Center, Inc., 351 NLRB No. 9 (2007) in support of its proposition that teachable moments equate to disciplinary authority. In Berthold, a majority of the Board found that the LPNs were supervisors because they had the authority to complete employee counseling forms under the employer’s progressive discipline procedure, thereby issuing discipline that could affect an employee’s job status. Id. slip op. at 3. The counseling forms in Berthold, however, are easily distinguishable from the teachable moments here because, as discussed above, there is insufficient evidence to demonstrate that teachable

moments are part of the Employer's progressive discipline procedure. As set out above, although there was testimony that, after so many teachable moments an employee may be written up under the progressive discipline procedure, the Employer failed to provide any specific examples in which a CNA received a written warning based on a prior teachable moment.

b. Written Warnings

The Employer further asserts that charge nurses are 2(11) supervisors because they have the authority to issue written warnings under the progressive discipline procedure. The DON testified that, although a charge nurse can issue a write up without meeting with her, many times they do in fact "consult" because she has access to the employee's personnel file and can check to see if the employee has been written up in the past for similar misconduct. However, the Employer failed to provide specific examples of charge nurses issuing written discipline without consulting with the DON. Further, the Employer failed to provide a detailed account of the "consultations" between the DON and charge nurse and failed to cite a specific example when such consultations have taken place.

In further support of its argument, the Employer presented two counseling records signed by charge nurses and issued to CNAs. The first counseling record was issued to a CNA who failed to perform her job duties. On the supervisor signature line, the counseling record was signed by the then-DON. The signature of the charge nurse was inserted above the DON's signature. The record is silent concerning whether the charge nurse who signed the record actually initiated the discipline or played an authoritative role in issuing discipline.

On this particular occasion, the counseling record notes that the CNA declined a witness. There was testimony at hearing that both management and employee's can bring witnesses to disciplinary meetings. In fact, one charge nurse testified that she attended a disciplinary meeting

as a witness for a CNA. Without more specific evidence as to the actual role of the charge nurse on this particular occasion, it is unclear whether she was present as a witness, recommender or co-decision maker.

The second counseling record was similarly issued to a CNA who failed to perform her job duties. Both a unit manager and charge nurse signed on the supervisor signature line.

Although there was a statement from a charge nurse attached to the counseling record, the record is unclear who in fact made the decision to discipline the CNA. In this regard, the charge nurse's statement does not provide a recommendation for disciplinary action; it simply reports the events that took place. The record demonstrates that, when investigating incidents that may result in discipline, the Employer will solicit statements from witnesses. As CNAs have similarly provided written statements that were later attached to employee counseling records, without additional testimony regarding the discussions between the charge nurse and management regarding this particular incident, I find there is insufficient evidence to demonstrate that the charge nurse effectively recommended that the CNA be disciplined. This is especially true in light of the fact that the charge nurse who signed the counseling record and the charge nurse who submitted the statement were two different individuals.

In support of its argument that charge nurses have the authority to issue written discipline, the Employer cites Progressive Transportation Services, Inc., 340 NLRB 1044 (2003) in which the Board found that an individual who drafted "notes to file" recording verbal counselings and issued written warnings and suspension notices to be a supervisor under the Act. In Progressive Transportation, the purported supervisor signed disciplinary records on the supervisor signature line, issued discipline in the absence of management and issued discipline notices in the first person. Id. at 1044. In addition, although the employer did not have a written

disciplinary policy, notices issued by the individual were referenced in subsequent employee discipline. Id. at 1044-1045. In finding that the individual had the authority to effectively recommend discipline, the Board relied on the fact that the supervisor, using independent judgment, brought rule infractions and misconduct to management's attention, thereby initiating the discipline process. Id. at 1045. More specifically, the evidence established that the supervisor brought disciplinary infractions to management's attention, who then decided the level of discipline based on the supervisor's account. Id. at 1045-1046. Management usually followed the supervisor's recommendation without conducting an independent investigation. Id.

Unlike the facts presented in Progressive Transportation, here, there is no evidence that the charge nurses record verbal counselings, issue written warnings or suspensions.

Furthermore, there is no evidence that charge nurses either discipline in the absence of management or sign as the sole supervisor issuing discipline. In regard to charge nurses reporting infractions, the record here demonstrates that management considers employee complaints or concerns from its entire nursing staff regardless of their job title. For example, a charge nurse received a written warning based on conduct detrimental to company operations. Attached to the employee counseling record was a statement from a CNA in which the CNA stated that she "went to find the Administrator to inform her of the incident." In addition, several years ago a charge nurse was suspended and later terminated following a CNA's report of patient abuse. Thus, it appears that anyone can report infractions to management thereby initiating the progressive discipline procedure.

c. Authority to Send a CNA Home/Suspend

Finally, the Employer asserts that charge nurses are 2(11) supervisors because they have the authority to ask a charge nurse to leave the facility. In this regard, witnesses testified that

charge nurses have been informed that they can send a CNA home. One charge nurse testified that the former ADON told her during orientation that she has the authority to ask a CNA to leave if there is a safety issue or threat to the facility, however, she admits that she has never exercised this authority. Another charge nurse similarly testified to having the authority to send a CNA home, but likewise admits that she has never exercised the authority.

I find the record is devoid of specific evidence that charge nurses possess the authority to suspend CNAs. To the extent the record demonstrates that charge nurses have the authority to suspend CNAs for safety reasons, the Board has held an individual's authority to send an employee home for committing egregious conduct affecting the health and safety of patients, does not constitute supervisory authority. Vencor Hospital-Los Angeles, 328 NLRB 1136, 1139 (1999)(citing Washington Nursing Home, 321 NLRB 366 (1996)).

(4) Adjust Grievances

The Employer contends that the charge nurses have the authority to adjust grievances. The record, however, fails to establish that the charge nurses have anything more than mere paper authority to adjust employee grievances. In this regard, the LPN job description indicates that a charge nurse is expected to "...review personnel complaints and concerns and ensure that all personnel are treated consistent with policies and applicable laws." However, there was insufficient evidence to demonstrate that the charge nurses actually exercise the prescribed authority.

With respect to the contractual grievance procedure, the evidence demonstrates that under the collective bargaining agreement, CNAs have the right to go to their "immediate supervisor," an Employer representative or a union steward to initiate a grievance; yet, there was no specific evidence of contractual grievances being submitted directly to charge nurses under

the auspices of “immediate supervisor.” In fact, the record indicates that grievances are generally submitted directly to the Administrator, as opposed to lower level stipulated supervisors such as the second shift supervisor, the weekend supervisor or unit managers. I further note that the Employer did not present copies of grievances submitted to or accepted by a charge nurse to buttress its claim that charge nurses are the first step in attempting to resolve grievances.

The record reveals that once a contractual grievance is initiated, the Administrator meets with the Union’s representative to discuss a resolution. Again, there was no testimonial or documentary evidence that the charge nurses play an active role in these grievance discussions.

One Employer witness testified that employee concerns such as unequal work, not being allowed to leave for emergency situations, or having to work with disliked co-workers are normally handled informally, not through the parties’ contractual grievance procedure. The witness further testified that when these issues arise, the charge nurse is the primary, or at the very least, the initial person to address the concern, and that he or she may do so within his or her discretion. However, when the issue was probed further, the witness admitted that her belief that charge nurses handle these informal grievances is an assumption, rather than fact, stemming from the absence of contractual grievances on these workplace concerns.

When asked to provide specific examples of charge nurses’ adjusting employees’ informal grievances, the Employer cited two occasions when CNAs approached charge nurses regarding difficult family members and resident verbal abuse. These complaints involve patient matters as opposed to matters affecting terms and conditions of employment. I, therefore, find that the Employer did not meet its burden to establish that charge nurses exercise the authority to adjust employee grievances.

(4) Evaluate

The Employer asserts that the charge nurses play an active role in the CNA evaluation process. As the Board has observed, because Section 2(11) does not include “evaluate” in the enumerated supervisory indicia, it is only when an evaluation affects the wages or job status of an employee that the individual performing the evaluation will be found to be a supervisor.

Harborside Healthcare, 330 NLRB at 1334. I find that the record does not support a conclusion that the charge nurses play a role in evaluating CNAs.

Although the record establishes that the Employer evaluates the performance of the CNAs on an annual basis, the record contains inconsistent testimony concerning the mechanics of the evaluation process. In this regard, the DON testified that charge nurses evaluate the CNAs similarly to the way in which she evaluates the charges nurses, although they utilize different forms. Upon completing the written evaluation, the charge nurse takes it “up front” and does not seek the DON’s approval before submission.

In contrast, the Administrator testified that the DON or unit manager seeks the charge nurses’ verbal, as opposed to written, input when evaluating CNAs. The Administrator further testified that, unbeknownst to charge nurses, management will often rely on informal hallway conversations to evaluate CNAs. When questioned whether there are CNA evaluations with charge nurse signatures, the Administrator testified that such documents do not exist because the past practice involves the DON meeting with the charge nurse and soliciting verbal input as opposed to the charge nurse actually completing a form. This testimony is inconsistent with that of the DON, as the DON’s testimony indicates that the charge nurses actually complete and submit a CNA evaluation form.

More telling is the testimony of two current charge nurses, each of whom denies participating in the CNA evaluation process. Although one charge nurse testified that during a February 2008 in-service meeting the Administrator told charge nurses they would play a role in future CNA evaluations, the record is devoid of specific examples of a charge nurse knowingly providing written or verbal input into a CNA's evaluation.⁸

The record, therefore, does not provide sufficient evidence that the charge nurses participate in the CNA evaluation process. Even assuming, that charge nurses do actively participate, there is insufficient evidence to establish that the evaluation affects the CNA's terms and conditions of employment. In this regard, the CNA evaluations have no effect upon wages because all CNAs receive similar wage increases, as mandated by the negotiated tentative collective bargaining agreement. The Employer asserts, however, that evaluations do affect job status. In this regard, the Employer asserts that if a CNA receives a poor evaluation a "plan of action" is created between the CNA and the unit manager or DON. If the CNA's performance fails to improve, the disciplinary process is initiated.

The record contains only speculative and non-specific testimony concerning the effect of the evaluation on a CNA's job status. That is, the record is silent concerning any specific instance when a charge nurse has provided negative information regarding the performance of a CNA which resulted in a "plan of action" or otherwise affected the CNAs continued employment at the facility. I, therefore, find that the Employer has failed to meet its burden of proving that charge nurses are supervisors within the meaning of Section 2(11) of the Act.

⁸ The Administrator could not recall the specifics of the February 2008 in-service meeting; nevertheless, she admits that it has been brought to the charge nurses' attention that the Employer intended to get them more involved in the evaluation process.

B. The wound care nurse is a supervisor under the Act.

The Employer asserts that the wound care nurse is a supervisor because she exercises the authority to assign, direct, discipline, adjust grievances and evaluate restorative CNAs. I find that the wound care nurse is a supervisor because she assigns within the meaning of Section 2(11) of the Act and exercises independent judgment in making assignments. Accordingly, below I will discuss the evidence supporting my conclusion that the wound care nurse assigns work with independent judgment, after which I will address the Employer's arguments regarding the wound care nurse's authority to direct, discipline, adjust grievances and evaluate restorative CNAs.

(1) Assignment

The record demonstrates that the wound care nurse has the authority to assign the restorative CNAs to a location and she does so using independent judgment. In this regard, the wound care nurse testified that she has a list of residents needing restorative care and, based on that list, she alone assigns the restorative CNAs to a particular resident. Unlike the charge nurses, there are no preprinted assignment sheets or a scheduled rotation; the assignment is within her sole discretion.⁹ The wound care nurse further testified that when making assignments she tries to rotate the CNAs so they grow accustomed to all residents; however, the rotation will cease if she decides that a CNA is better placed in a different location to avoid conflict. Other factors the wound care nurse considers when making assignments are the acuity of the patient, the amount of care involved in tending to the patient and, most importantly, the aptitude of the particular restorative nurse. Based on the discretion the wound care nurse exercises when

⁹ Similar to regular CNAs, the restorative nurses have regularly scheduled lunch and breaks. The schedule is posted in the wound care nurse's office – an office shared with medical records.

assigning restorative CNAs, I find that she has the authority to assign and does so using independent judgment.

(2) Responsibly Direct

I find that although the wound care nurse directs the restorative CNAs, there is insufficient evidence that she is held accountable for their conduct. In this regard, the record demonstrates that the restorative CNAs spend a majority of their time performing rehabilitative work with residents. The rehabilitation department trains the wound care nurse and restorative CNAs on how to care for each patient. In addition, the rehabilitation department prepares a document that sets forth the guidelines for each specific resident; this document supplements the patient's kardex file.

Even though the rehabilitation department plays a key role in training the restorative CNAs, the burden falls on the wound care nurse to make sure that the restorative CNAs are following proper procedures. In this regard, once a week the wound care nurse will observe the restorative CNAs to ensure that they are appropriately splinting, performing range-of-motion and following other guidelines implemented by the rehabilitation department. In addition, the wound care nurse conducts a meeting with the DON and restorative CNAs during which reports are made regarding the patient's status and the CNAs confirm completion of required procedures.

Before departing each day, restorative CNAs must first check with the wound care nurse so that she can confirm that they have filled out the proper paperwork. The wound care nurse will also physically check each patient to make sure all splints are removed. In all, the wound care nurse spends about 60% of her time overseeing the work of the restorative CNAs; the other 40% of her time is directly consumed with patient care.¹⁰ Based on the above-described

¹⁰ Unlike charge nurses, the wound care nurse does not make scheduled rounds. Instead, she attends to patients per doctor's orders.

oversight, I find that the record demonstrates that the wound care nurse directs the work of the restorative CNAs.

The next inquiry in the analysis is whether the wound care nurse is held accountable for the conduct of the restorative CNAs. I find that there is insufficient evidence to establish accountability. In this regard, the wound care nurse's evaluation gives consideration to her ability to lead and motivate subordinates; however, there was no testimonial evidence indicating why her performance in this area was deemed only to "meet expectations." Thus, the record is ambiguous concerning whether the wound care nurse is evaluated on her ability to lead and motivate others or whether, as required by the Board in Oakwood, she is held accountable for the conduct of the restorative CNAs. This indicia, therefore, has not been established by a preponderance of the evidence.

(3) Discipline

There is insufficient evidence to establish that the wound care nurse has the authority to discipline. In this regard, there was testimony that the wound care nurse can issue teachable moments, but as discussed above, I have found that teachable moments do not equate to disciplinary action.¹¹

The wound care nurse testified that she has the authority to discipline under the progressive discipline procedure and she can exercise the authority using independent judgment, as she does not have to consult with stipulated supervisors prior to issuance. In spite of the wound care nurse's testimony, the Employer failed to present any concrete evidence that the authority to issue written discipline actually exists.

¹¹ I note that even if teachable moments are found to be discipline, the evidence demonstrates that the one time the wound care nurse delivered a teachable moment to the restorative CNAs she first discussed the matter with the DON. The record is ambiguous concerning the specifics of these discussions; therefore, it is unclear whether she exercised independent judgment when deciding whether to give a teachable moment.

Finally, the wound care nurse testified that she can send a restorative CNA home; however, I find the record fails to establish such authority. In this regard, the wound care nurse testified to a verbal altercation between herself and a restorative CNA, after which the CNA was suspended. But it was not the wound care nurse who made the decision or even recommended the suspension; instead, the evidence demonstrates that the Administrator stepped in and made the decision to immediately suspend the restorative CNA pending an investigation. Similarly, it was stipulated supervisors who initiated the investigation into the verbal altercation. The wound care nurse admits that her only role in the incident was to provide a written statement detailing her account of the events. Noting that the wound care nurse did not play any type of authoritative disciplinary role in an incident in which she was directly involved, I find that the record failed to establish that she has the authority to suspend or otherwise send employees home. In sum, the record is insufficient to show that she has the authority to suspend, or that any of her actions in this area reflect the use of independent judgment.

(4) Adjust Grievances

Although there is evidence that the restorative nurses bring complaints and concerns to the wound care nurse, there is insufficient evidence to establish that the wound care nurse has the authority to adjust these informal complaints. In this regard, the wound care nurse testified that restorative CNAs will bring issues to her attention such as employees not taking breaks at the appropriate time or unfair workloads. The wound care nurse addressed the break time concerns through a teachable moment and addressed the workload concerns by assigning nurses to a designated area and having them report to her at the end of the shift to confirm the assigned work had been completed. I find that this informal resolution of employee concerns does not rise to the level of “adjusting” grievances. In Public Service Company of Colorado v. N.L.R.B., 405

F.3d 1071, 1080 (10th Cir. 2005), the Court enforced a Board order finding that revenue-protection workers were not supervisors because their occasional response to employee concerns regarding bonuses did not amount to adjusting employee grievances. The Court noted that there is a difference between adjusting grievances and correcting mistakes noted by employees. Id.

Here, the complaints regarding breaks were simply about employees mistakenly taking breaks at inappropriate times; thus, I find the wound care nurse's issuance of a teachable moment to address this employee concern does not rise to the level of adjusting an employee grievance. Similarly, in regard to workload complaints, I find that the record demonstrates that restorative CNAs were complaining about their peers not completing assigned work; thus, the wound care nurse was simply correcting peer neglect brought to her attention. Such corrections do not rise to the level of having the authority to adjust grievances, as "resolution of minor employee complaints regarding workload, lunch and break schedule conflicts, or personality conflicts is insufficient to establish supervisory authority." Beverly Enterprises, Alabama, Inc., 304 NLRB 861, 865 (1991)(citing Ohio Masonic Home, 295 NLRB 390 (1989)).

Finally, I note that there is no evidence that the wound care nurse participates in any steps of the contractual grievance procedure under which the restorative CNAs can file formal grievances. Based on the above, I conclude that the wound care nurse does not have the authority to adjust employee grievances.

(5) Evaluate

The record demonstrates that the wound care nurse directly participates in restorative CNAs' evaluations. In this regard, there was evidence that the wound care nurse performed a restorative CNA's evaluation sometime around late February 2008. The wound care nurse testified that she was told to perform the evaluation by the DON, who similarly told her that she

is now responsible for evaluating restorative CNAs. The February 2008 evaluation was the first evaluation completed by the wound care nurse for a restorative CNA. As the wound care nurse conducted the evaluation without any input from stipulated supervisors, I find that the record demonstrates that she has the authority to evaluate.

Although the wound care nurse participates in the evaluation process, I find that such evaluations do not affect the restorative CNAs terms and conditions of employment as merit increases are defined by the collective bargaining agreement. As there is no additional evidence that evaluations affect terms and conditions of employment, I find that the wound care nurse's ability to evaluate restorative CNAs is not indicative of supervisory status.

IV. CONCLUSION AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purpose of the Act to assert jurisdiction in the case.
3. The Union involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time licensed practical nurses employed by the Employer at its facility in Wilson, North Carolina;

but excluding all other employees, registered nurses, the wound care nurse, and guards, other professional employees and other supervisors as defined in the Act.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time registered nurses employed by the Employer at its facility in Wilson, North Carolina; but excluding all other employees, licensed practical nurses, the wound care nurse, and guards, other professional employees and other supervisors as defined in the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the United Food and Commercial Workers Union, Local 204, a/w United Food and Commercial Workers International Union, AFL-CIO, CLC. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their

replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharge for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 4035 University Parkway, Suite 200, P.O. Box 11467, Winston-Salem, NC 27116-1467 on or before **June 27, 2008**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list.

Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 336-631-5210. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need to be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of three working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five full working days prior to 12:01a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th St. N.W. Washington, DC 20570 and received by the Board in Washington by **July 7, 2008**. The request may not be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial

correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-file your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

Dated at Winston-Salem, North Carolina, on the 20th day of June 2008.

Patricia L. Timmins, Acting Regional Director
National Labor Relations Board
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